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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 70.

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION NO. 38,

Petitioners-Appellants,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR APPELLANTS.

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NATURE OF APPEAL AND GROUNDS FOR JURISDICTION.

This is an appeal from the judgment of the United States Court of Appeals for the District of Columbia entered on February 27, 1939, in the case of American Federation of Labor, International Longshoremen's Association and Pacific Coast District International Longshoremen's

Association, No. 38, petitioners-appellants, v. National Labor Relations Board, respondents-appellants, dismissing a petition filed by appellants herein, seeking to review and set aside an order of the National Labor Relations Board. The decision of the Court may be found in 103 Fed. (2d) 933. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. The case devolves upon an interpretation of the review provisions of the National Labor Relations Act. Decisions of the various Circuit Courts of Appeal are in disagreement upon such interpretation and upon the question of whether orders similar to the one presently involved are final and appealable. Petition for writ of certiorari was filed with this Court on June 5, 1939, by appellants herein, and an order granting the petition for writ of certiorari was entered October 9, 1939.

STATUTE INVOLVED.

The only statute involved in the present case is the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. 151, Sections 9 and 10 thereof, and particularly subsection (f) of Section 10.

STATEMENT OF THE CASE.

This appeal arises from the dismissal of a petition for review filed in the United States Court of Appeals for the District of Columbia under Section 10 (f) of the National Labor Relations Act, in which appellants herein sought to review and set aside an order of the National Labor Rela-

tions Board certifying the International Longshoremen's and Warehousemen's Union, a labor organization affiliated with the Congress for Industrial Organization, as the exclusive bargaining representative for all the longshore employees on the West Coast of the United States.

Appellants are three labor organizations—the Pacific Coast District International Longshoremen's Association No. 38, the International Longshoremen's Association, with which Association No. 38 is affiliated, and the American Federation of Labor, with which both are affiliated. Members of the International Longshoremen's Association are engaged in longshore work on the Pacific Coast and in other portions of the country, and the International Longshoremen's Association had for many years prior to the decision of the Board represented thousands of longshore employees on the Pacific Coast and had set up and maintained many local unions in all of the principal West Coast ports.

A dispute having arisen between the International Longshoremen's and Warehousemen's Union (hereinafter termed the CIO), a rival labor organization, and the appellants herein, concerning representation of longshore employees on the West Coast, the CIO petitioned the Labor Board to certify it as exclusive bargaining agent for all longshore employees on the West Coast. Appellants in their answer denied the Board's power to prescribe a bargaining unit larger than the employees of an individual employer. After lengthy hearings before a trial examiner appointed by the Board at which both labor organizations and the employers were represented and many witnesses examined, the Board, on June 21, 1938, made elaborate findings of fact and conclusions of law, and issued its decision and order of certification (see R. 6-58), certifying the CIO as the **exclusive** bargaining agent of all employees of all longshore employers operating in Pacific Coast ports

from Canada to Mexico.[1] These employers, of which there were some 200, thereupon entered into a collective bargaining contract with the CIO, through an employer association, in which the CIO was recognized as the exclusive bargaining representative of all West Coast longshore employees, and its members given a preferential employment status. (See R. 5.)

A petition objecting and excepting to the decision of the Board and asking for a rehearing filed with the Labor Board by the appellants on August 15, 1938, was denied by the Board on August 27, 1938. (See R. 59 and 61.)

The appellants then sought to appeal to the United

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[1] The Board's Order of Certification, together with the conclusions of law on which it is based, are as follows:

Conclusions of Law.

1. A question affecting commerce has arisen concerning the representation of longshoremen in the Pacific Coast ports of the United States, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. The workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

3. International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all the workers in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the National Labor Relations Act.

Certification of Representative.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

It Is Hereby Certified that International Longshoremen's and Warehousemen's Union, District No. 1, has been designated and selected by a majority of the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9 (a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

States Court of Appeals for the District of Columbia under Section 10 (f) of the National Labor Relations Act as a "person aggrieved by a final order of the Board" (see R. 1-5 and 62), solely for the purpose of obtaining a determination from the Court of the power of the Board under the Act to prescribe the coastwide unit.

The petition for review alleged generally that the order of certification was contrary to law in that the Act did not give the Board power to prescribe a unit larger than that composing the employees of an individual employer, and that as a result of the decision and order of certification, petitioners, although selected by a majority of the employees of a large number of individual employers, and functioning as collective bargaining representative for thousands of longshoremen on the West Coast, were nevertheless unlawfully deprived of their status as collective bargaining agents and were unlawfully deprived of their right to represent longshore employees and to engage in business as labor organizations on the entire West Coast of the United States; their membership was being destroyed; their locals were being disrupted; and investments of many thousands of dollars in organizing expenditures, strike and welfare benefits, and maintenance payments made through the years were being lost; and that petitioners were thereby aggrieved by the decision and order of the Board.

The respondent, National Labor Relations Board, denying none of these allegations, thereby assuming the unlawfulness of its action, filed a so-called special appearance objecting to the jurisdiction of the Court of Appeals to hear the appeal and moved to dismiss the petition (R. 64).

Briefs were filed by both parties and the case was argued December 5, 1938. On February 27, 1939, the Court handed down its decision dismissing appellants' petition and holding that the order was not a "final order" within the terms

of the act (see R. 69). In so deciding the Court freely conceded that, with respect to petitioners, the order was "definitive, adversary, binding, final, and in this case struck at the very roots of petitioners' union and destroyed its effectiveness in a large geographical area of the nation." However, the Court felt itself bound to find that the order, not being made in the language of a command, but merely certifying a rival union as exclusive bargaining agent, and hence being in the nature of a "negative order," was not a final order by reason of the decisions of this Court in **Shannahan v. United States**, 303 U. S. 596, and in **Shields v. Utah Idaho Central Railroad Company**, 305 U. S. 117.

Subsequent to the date of that decision this Court in the case of **Rochester Telephone Corporation v. The United States of America and Federal Communications Commission**, 83 L. Ed. (adv. sheets) 719, decided April 17, 1939, re-examined in its entirety the law relating to appealable orders of administrative bodies and rejected the doctrine of "negative orders." Thereupon, on the 20th day of May, 1939, appellants, relying on the Rochester case, applied to the United States Court of Appeals for the District of Columbia for permission to file a petition for rehearing. This petition was denied on the 24th day of May, 1939, for the sole reason that the term of court in which the decision was made having expired April 1, 1939, the Circuit Court was without jurisdiction to entertain a petition for rehearing (see R. 75).

QUESTIONS PRESENTED.

Two questions are involved in this case:

(1) Is an order of the National Labor Relations Board, entered at the conclusion of a representation proceeding under section 9 of the act prescribing an unlawful unit and

unlawfully certifying one of two rival labor organizations as exclusive representative of the employees in such unit, reviewable in the Circuit Courts of Appeal at the instance of the aggrieved labor organization?

(2) Is such an order, entered after lengthy hearings in an adversary proceeding instituted and consummated solely for the purpose of determining the question of the appropriate unit and of certifying a representative, a "final order" within the meaning of section 10 (f) of the act as to the rejected union?

SUMMARY OF ARGUMENT.

I.

Section 10 (f) of the act provides that "any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought, may obtain a review of such order" in the various circuit courts of appeal. The broad language of the phrase "any person aggrieved" was employed by Congress designedly to permit relief in all cases where parties to proceedings instituted under the authority of the act were adversely affected by a final order entered at the conclusion of such proceedings. "Any person" does not refer solely to persons involved in unfair labor practice cases, as the Board contends, or Congress would have specifically so provided and would not have employed the broad language set forth in section 10 (f). Congress did not intend to foreclose all rights in a situation where the very existence of a labor organization was threatened by an unlawful act of the Board. An attempt to do so would be subject to constitutional objections; in case of ambiguity the act must be construed in a manner preserving its constitutionality. Section 10 (f) is ame-

nable to the construction that permits appeal in a case similar to the present one, and should be so construed in order to preclude constitutional assault. Thus, the only remaining question is whether the order here involved is a "final order."

II.

The order in the present case fulfills all the legal requirements of a final order of an administrative tribunal, and is appealable as such. The order was entered after a lengthy hearing, instituted to settle a specific dispute in which adverse parties participated. The proceedings were directed solely to the end of determining the question of the appropriate unit and certifying a bargaining representative. No further administrative action is contemplated by the Board—indeed, is not possible—so far as concerns the appellant unions. Appellants' rights have been adversely and grievously affected; their effectiveness has been destroyed throughout the entire West Coast.

The fact that no order was directed expressly against appellant unions, as stressed by the court below, is immaterial. Since the decision of this Court in **Rochester Telephone Corporation v. United States** superficial distinctions must yield to substantive realities. The criteria, grounded on reason and policy, established in the **Rochester case**, requiring that primary jurisdiction remain in the Board, that administrative finality be given its factual findings, and proscribing appeals from preliminary or non-final orders, are all met in the present case. Here the review sought calls for no technical knowledge pertaining to labor relations. It involves only a question of statutory authority, which is properly within the exclusive province of a court.

ARGUMENT.

The American Federation of Labor is seriously disturbed over the tremendous implications of this case. The employees of hundreds of employers have been thrown together into one unit, many against their voiced desires. Thousands of these employees are members of the American Federation of Labor. Separated and grouped in individual employer units, these employees have by large majorities, and sometimes by 100 per cent unanimity, selected the American Federation of Labor as their bargaining agent. But the Board's order has deprived them of their right to bargain through the American Federation of Labor. What accentuates the tragedy is that it does violence to the fundamental principles of the National Labor Relations Act. The Act guarantees the right to "bargain collectively through representatives of their **own choosing**" (Section 7). The Act is founded on the fundamental proposition that the employees' choice of representation shall be absolutely free from employer influence. But this decision of the Board flouts this principle by granting to the employer control over the selection of the employees' representation. To illustrate:

Assume three employers, "A," "B," and "C"; each employing 1,000 workers; "A" votes 750 for the C. I. O. and 250 for the A. F. L.; "B" votes 800 for the C. I. O. and 200 for the A. F. L.; "C" votes 1,000 for the A. F. L. Under the Board's decision the C. I. O. becomes the bargaining agent for the thousand A. F. L. employees of "C." This is accomplished by "A," "B" and "C" associating in an employer organization. If "C" refuses to combine with "A" and "B," his 1,000 employees, having selected the A. F. L. as their representative, will be represented by the A. F. L. By the same token, if "C" was in association with "A" and "B," and desired to keep the C. I. O. from his plant, he could simply withdraw from the combination.

In other words, control over the employees' choice is vested in the employer by either entering into or withdrawing from an association.

The same kind of example will illustrate how employer "C," by combining with "A" and "B," can dictate who shall bargain for the employees of "A" and "B." If 700 of A's employees want the C. I. O. and 300 the A. F. of L., and 700 of B's employees want the C. I. O. and 300 the A. F. of L., "C," by associating with "A" and "B," compels the employees of "A" and "B" to be represented by the A. F. of L. The Act never intended to vest such control in an employer or such deprivation of fundamental rights of employees. The Act may vest some discretion in the Board in respect to unit, but it does not intend to permit discretion to run riot.

Chairman Madden, in a public address delivered September 6, 1937, has succinctly expressed the foregoing thoughts:

> "But the choice does not lie with the employer, **nor the Board**; the choice lies with the men themselves, and the Board's duty is to protect them in their choice."

Moreover, the foregoing does not indicate all the inherent dangers of this decision of the Board. It was never contemplated that all of the employees in a given industry throughout the United States shall, against the desires of employees of individual employers, be bargained for by one representative as a result of a combination of the employers into an association. It is nowhere disclosed that Congress intended such vast economic and social consequences.

Just as the employers on the West Coast have formed an association, so may the employers of longshoremen of the Gulf of Mexico and of the Atlantic Coast form an

association. These employers may in turn join with the West Coast employers in a single association or chamber of commerce, which shall, among other things, undertake bargaining. Thus the employees of thousands of employers all over the United States, living in different geographical areas and desiring to be bargained for by representatives who are close to them (in all probability, officers of their local unions), who understand the problems peculiar to their localities, are denied the right of bargaining through such representatives. It would be possible for the employers in the Cities of San Francisco and New York to control the labor relations of the entire longshore industry in the United States, with no right on the part of the employees of thousands of employers in other parts of the country to do anything about the matter, unless they wish to resort to strike. The control thus vested in the employers through their association and the larger groups of employees of a few employers would make it possible to enter into closed-shop contracts and thereby procure the discharge of thousands of workers throughout the country and replacement of such workers by members affiliated with the dominant group. If Congress intended so radical a transformation of the economics of the country, it would have said so in clear and explicit terms, and even then there would remain a serious constitutional question.

Industry-wide bargaining should be on a voluntary basis by consent of the majority of the employees of each employer, and not by administrative fiat. If, by the doctrine pronounced by the Board, employers are free to combine or not to combine, it would certainly follow that the Labor Relations Act grants to employees the same freedom in matters so vital to employees.

It should not be made possible by administrative fiat to obliterate existing labor organizations desired and selected by the employees of individual employers. Years of organ-

izational efforts on the part of local unions are aborted by this decision against the express wishes of the majority of employees of individual employers.

Desirability and feasibility of industry-wide bargaining is dependent on the unanimity and consent of the separate groups of employees. Such unanimity is absent in a rival union situation. The Board, therefore, errs in predicating its decision upon the fact of previous industry-wide bargaining when no rival union situation existed, and when the law did not guarantee freedom of choice.

Yet, in the present case, the Board contends that we are to be denied the right to appeal to a court of law for a determination of this vital fundamental issue.

I.

INTRODUCTORY STATEMENT.

Preliminarily this appeal brings before the Court a problem in statutory construction, involving a question of constitutional necessity for judicial review of an administrative decision. The court below has passed upon this preliminary question in appellants' favor, and held that there is nothing in the act which denies appellants a standing "as a person aggrieved by a final order" of the Board. The lower court held, however, that the order was not a "final" one, reluctantly predicating this holding upon its view of the "test" established in the **Shannahan** and **Shields** cases,[2] that an order to be final must be made in the language of a command and must direct a particular thing to be done. Accordingly the principal problem involved in this case is the "finality" necessary for a judicial review of administrative orders—a problem recently re-examined at length by this Court in **Rochester Telephone Corpora-**

2 Shannahan v. United States, 303 U. S. 596; Shields v. Utah Idaho Central Railroad Co., 305 U. S. 117.

tion v. United States, 83 L. Ed. 719. The Rochester case, by clarifying the Shannahan and Shields cases, substantially limits the applicability of those cases. The law no longer exacts such artificial prerequisites to the existence of an appealable order relied on by the court below.

A full appreciation of the significance of the position taken by the administrative tribunal here involved is important to an ultimate determination of this case. Appellants here seek merely a determination of a pure question of law not affecting administrative expertness or finality. The Labor Board, although suggesting no policy considerations and in no way minimizing the dire predicament in which appellants are placed by its action, coldly argues that no court exists to which appellants can turn for a determination as to whether the Board has exceeded its authority under the act; that appellants must suffer without hope of relief their destruction in a large and important area of the United States by administrative fiat. The Board resorts to technical refinements of the language of the National Labor Relations Act in support of its position. For an administrative body to take such a stand unfortunately gives substance to the early criticism directed against the increasing power of administrative tribunals as a dangerous innovation.[3] It is not our purpose to criticize in any manner whatsoever the prevalent and growing use of administrative tribunals to regulate and govern the affairs of a complex industrial society. It is our purpose to seek preservation in this system of administrative government the fundamental ideals and principles of justice that the years have enshrined in the jurisprudence and procedure of our customary courts, ideals which have heretofore made the administrative system compatible with a democratic society. For the Labor

[3] See Sutherland, Private Rights and Governmental Control (1918), 85 Cent. L. J. 168; Allen, Bureaucracy Triumphant; The Rt. Hon. Lord Hewart of Bury, The New Despotism; Kidd, Encroachment of Administrative Bodies on the Judicial Sphere (1920), 45 Scot. L. Rev. 325.

Board thus to seek insulation from court inquiry into determinations of such importance and consequence as those involved here is to attempt arrogation unto itself of autocratic powers in dangerous disregard of all concepts of the function of the judiciary in our present form of government. The Board has nowhere so much as suggested a remedy that may be available to appellants; on the contrary, it has strenuously resisted every effort to obtain a judicial hearing as to a purely legal question.

Let us inquire into the Board's arguments.

II.

SEC. 10 (f) PERMITS REVIEW OF FINAL ORDERS ENTERED IN REPRESENTATION PROCEEDINGS UNDER SEC. 9.

A. Board's Argument.

At the outset we are met by the contention on the part of the Board that determinations in representation proceedings instituted under Section 9 of the National Labor Relations Act are immunized against judicial review because the Act provides only for appeal from orders in unfair labor practice cases, and, therefore, inferentially denies appeal in all other matters. This argument, based on a technical construction of section 10, can assume the "finality" of the order in question. The Board's argument runs somewhat as follows:

The provision for review by "any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought" appears in section 10 of the Act; because such section is entitled "Prevention of Unfair Labor Practices" and because such section deals mainly with proceedings to prevent unfair labor practices the provision for review must, therefore, relate only to unfair

labor practice cases.[4] This must be true, says the Board, because section 9 (dealing with the selection of representatives), under which the present proceedings were instituted, contains no provision for review.[4a]

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[4] Section 10 (f), N. L. R. A., reads:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing the Court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

[4a] Sec. 9. Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The Board argues that, since the use of the word "person" in subsections a, b, c, d and e of section 10 relates to the employer as the "person" committing the unfair labor practice, that it likewise refers to such "person" in section 10 (f). Accordingly it contended in its brief below that "the words 'such person' are always used to mean a person alleged to have engaged in unfair labor practices, as an analysis of Section 10 as a whole demonstrates." But the Board proves too much, for it has proved that the employer, who is the only one who can commit an unfair labor practice, alone can have a right of appeal in any case, and the aggrieved labor organization would have no recourse whatsoever. Therefore, such appeals as have been taken by the unions to the circuit courts and to the Supreme Court of the United States, as in the Consolidated Edison Company case,[5] in unfair labor practice cases are unauthorized and have no standing. This, of course, is not the law or the fact, and the Board would not so contend. But the point serves to refute the Board's argument that merely because the word "person" is used in the first five subsections of section 10 as referring only to an employer, that it must therefore refer only to an employer in section 10 (f).

B. Language of Section 10 (f) Is Extremely Broad, and Designedly So.

The Board's argument entirely disregards the extremely broad language used by Congress in section 10 (f). "Any person aggrieved" is an exceedingly broad phrase. It can include a variety of individuals. Surely Congress used the term "any" designedly. The word "person" includes a labor organization. [The definition in section 2 (1) of the Act states that "The term person includes one or more individuals, partnerships, associations, corpora-

[5] Consolidated Edison Co. of N. Y., Inc., v. N. L. R. B., 59 S. Ct. 206.

tions."] "Aggrieved" is a term having a well-understood meaning in the law, and obviously would include persons whose property rights have been violated or disturbed. "Final order" is such order of an administrative body as is recognized by the courts as reviewable. A discussion of this phrase is set forth in a later portion of this brief. The language "granting or denying, in whole or in part, the relief sought" is likewise extremely broad; no attempt is made to clarify as to the type of relief intended.

The Board argues that because it is later stated in the same sentence dealing with final orders that reviews shall be obtained in the Circuit Court "wherein the unfair labor practice in question was alleged to have been engaged in," Congress intended review only in unfair practice cases. The Board forgets that an alternative jurisdiction for review is likewise set forth in that sentence, which is in the "circuit wherein such person resides or transacts business," and a third alternative—"in the Court of Appeals for the District of Columbia"—is also provided for. If by the term "relief sought" it was intended merely to give the right to appeal in unfair labor practice cases, Congress could quite specifically have so stated by using definite language, such as "by the relief sought in unfair labor practice cases," or some similar language. This it did not do, but, instead, significantly refused to qualify the term.

C. Two Complete Proceedings Providing for Distinct Types of Relief Are Set Forth in Act. Congress Did Not Intend to Permit Review of Final Orders in One and Not the Other.

The National Labor Relations Act provides for two distinct types of relief for labor organizations. The first, set forth generally in sections 7, 8 and 10, relates to relief from certain unfair labor practices of employers. The second, arising under sections 8 and 9, gives relief from disputes

as to whether a majority exists in a claimed unit and from competitive bargaining through minorities and company unions, giving the right to labor to invoke the aid of the Board in determining whether it represents a majority or whether the unit that it wishes to represent is appropriate for bargaining purposes.

In this second type of case, which is the one here involved, an actual proceeding, including the taking of testimony and the making of a decision is provided for. Congress declares that "the Board shall **decide**" the appropriate unit and "**shall provide for an appropriate hearing upon due notice.**" The language of the section points to definitive action. The Board is not only authorized, but is directed to provide a hearing upon notice to determine the controversial question of an appropriate unit, and to certify the majority representative. An entire and complete proceeding is contemplated, which is of an entirely different nature from that prescribed in the section relating to unfair labor practices. Section 9 (a) confers on labor organizations a substantive right, that of exclusive representation, which accrues to a particular union, if the union can show it is in the majority in an appropriate unit. A majority is necessarily affected by the size, shape and type of unit designated by the Board as appropriate. The Board's decision to designate one of two units presented to it by two unions as appropriate, decides substantive rights, as can be readily seen by the present case. The Board's decisions can and will vitally affect the very life of labor organizations. It is not to be contemplated that Congress would prohibit appeals from such decisions.

In this connection the remarks of Circuit Judge Hicks in **International Brotherhood of Electrical Workers v. N. L. R. B.**, 105 Fed. (2d) 598, are relevant.

> "• • • It is this 'Second Direction of Election' which petitioners seek to have reviewed and set aside.

We are not concerned here with unfair labor practices as between employer and employee, set out in Sec. 10 of the Act, 29 U. S. C. A., par. 160. We are dealing with the procedure for the designation of representatives of employees for purposes of collective bargaining, described in Sec. 9, a concededly different matter. It is the policy of the United States, set forth in the third paragraph of Sec. 1 of the Act, 29 U. S. C. A., par. 151, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection. In National Labor Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, at page 265, 58 S. Ct. 571, 574, 82 L. Ed. 831, 115 A. L. R. 307, the court said:

" 'The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by section 7, 29 U. S. C. A., par. 157, to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 23, 33, 57 S. Ct. 615, 617, 81 L. Ed. 893, 108 A. L. R. 1352. This appears both from the formal declaration of policy in par. 1 of the Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., supra, 301 U. S. 1, at pages 22-24, 57 S. Ct. 615, 617, 91 L. Ed. 893, 108 A. L. R. 1352, and from section 7, in itself a declaration of the policy which, in conjunction with section 10 (c) [29 U. S. C. A., par. 160 (c)], it adopts as the controlling guide to administrative action.'

"Section 7 of the Act guarantees to employees the right to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection. Associated Press v. Labor Board, 301 U. S. 103, 123, 57 S. Ct. 650, 81 L. Ed. 953; National Labor Board v. Jones & Laughlin Steel

Corp., 301 U. S. 1, 33, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. It was said in the Jones & Laughlin case that this is a fundamental right. See, also, Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548, 571, 50 S. Ct. 427, 74 L. ed. 1034.

"Having made the guaranty, it was necessary that the Congress should adopt a procedure for the selection of such representatives. To this end Sec. 9 (a) provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining, etc. There is thus provided the simple American principle of majority rule. Virginian Ry. Co. v. System Federation No. 40 etc., 4 Cir., 84 F. (2d) 641, 652."

The Board does not attempt to explain why Congress should permit review in unfair labor practice cases and deny it in representation proceedings where issues of even more vital consequence to labor unions may be decided. The Board refers to certain Congressional Reports (H. R. No. 1147 and S. R. No. 573, 74th Congress) as authority for its position that it was the intention of Congress to bar relief in the type of situation before the Court. A careful reading of these reports discloses quite conclusively that it was the aim of Congress merely to avoid disturbance of the Board's orders or proceedings prior to a final determination, and that Congress was particularly concerned only with the denial of Court review **"prior to the holding of an election."** The Court's attention is directed to H. R. 1147, 74th Congress, pages 22-23, and S. R. No. 573, 74th Congress, page 5 et seq., wherein the congressional committees recited the unfortunate experience under Public Resolution No. 44, whereby the administrative machinery of the old Labor Board was

stalled by the extensive resort to courts by employers before the Board could take action.

The present case does not involve an attempt to impede a tribunal from concluding a proceeding and does not occur in an intermediate stage of a proceeding.

D. A Determination of an Appropriate Unit Is Not a Mere Finding of Fact. It Is a Conclusive Decision of a Substantive Question, Adjudicating Property Rights.

The manifest difference in the legal effect of the holding of an election and the decision of a unit by the Board precludes a convenient assimilation of one to the other as being a mere "determination of fact," as contended by the Board. The Board, in cases involving a determination of a unit, has prescribed various factors which must be taken into consideration in deciding the "appropriateness" of a particular unit. (See Third Annual Report N. L. R. B., pages 156 through 197.) Thus, the history of self-organization between the particular employees and the employer, eligibility of membership in local organizations, the mutuality of interest of employees, including the nature of the work involved, the skill involved, the wages paid, the functional coherence among employees in the unit under consideration—are all considered relevant in deciding what unit is or is not appropriate for the purpose of bargaining. No such exercise of discretion or determination of policy is involved in the conduct of an election. If, as argued by the Board, the determination of a unit is the mere certification of a fact, would it not be possible for any lay group to decide an appropriate unit? Obviously, only a board of experts trained in labor relations could make the judicial determination of what unit can be considered "appropriate." The Congressional Reports re-

lied on by the Board speak only of denying relief from a factual determination, not a judicial determination.

What is obvious from the Congressional Reports is that Congress fully intended to provide against arbitrary action of any sort by the Board, and fully intended to provide a complete review to any "aggrieved" party. In House Report No. 1147, p. 24, it is stated, in speaking of Section 10 (f):

> "According to a similar procedure, any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. **It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after an order is made.** Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

The Board refers to subdivision (d) of section 9 as indicating an absence of review, because it provides that where proceedings under section 9 are made part of proceedings under section 10, as is sometimes the case, review can be had in the proceeding under section 10. This section was primarily designed to provide protection for the employer. The **employer** in the present case was and is protected against such possible arbitrary action by section 9 (d). If he desires a review of a representation determination he need only refuse to bargain with the agency certified by the Board and thus bring into operation in a proceeding brought against him for unfair practices under section 10 the provisions of section 9 (d) dealing with the judicial review of such determinations. In the unlikely event that the certified agency chooses not to file charges,

then the certification does not harm the employer. Thus, the employer is fully protected.

Not so with appellants herein. A labor organization is necessarily injured by the unlawful certification of a rival union. **It has no further recourse before the Board.** Congress did not, we submit, intend to limit its protection against arbitrary decisions of the Board in representation cases to employers. The Board must concede that the only way a labor organization which has been adversely affected by a decision of the Board under section 9 can take advantage of section 9 (d) is to induce the employer to reject the Board's decision, subject himself to an unfair labor practice proceeding, have the Board make an order against him, find him guilty of unfair labor practices, secure a court review, and then, and then only, can the union intervene in the employer's petition for review. The suggestion that this might be done would come illy from the mouth of the Board. Further, appellants have no control over the employer, and if the employer elects to comply with the law there is no recourse by way of even a roundabout unfair-practice procedure. In the present case the employers involved have not only complied with the order of certification, but have entered into collective bargaining contracts with the rival union, recognizing it as exclusive representative and giving it preferential employee status.

It has been suggested that the aggrieved labor union could, in spite of the certification, insist that the employer treat it as the exclusive bargaining agent in the unit it considers appropriate; that upon refusal of the employer to so bargain the union could then file charges of unfair labor practices in the hope that the Board will issue a complaint and thereby obtain a review by the Circuit Court of Appeals on the question of the unit. This suggestion overlooks the fact that the Board has complete dis-

cretion over the issuance of a complaint. Surely, it will not seriously be contended that the Board will issue a complaint on charges filed because an employer has refused to bargain with union "A" after the Board has certified union "B" as the proper bargaining agency.

E. The Board's Contention That the Act Does Not Permit Review of the Present Order Endangers the Constitutionality of the Act. The Act Must Be Construed in a Manner Preserving Its Constitutionality.

It is submitted that the Board's contention that the absence of a specific, unmistakable provision for review in the Act is sufficient to deprive appellants of such right of review, and that Congress intended it so, is not only erroneous but is extremely ill-advised, for such contention unnecessarily exposes the National Labor Relations Act to successful constitutional attack. The Board has before attempted such unnecessary exposure. A similar argument was made by the Board in the Consolidated Edison Company case, supra. The Act does not by explicit provision require unions whose interests were affected to be made parties to an unfair labor practice proceeding. Specific provision for making parties defendant to the Labor Board's suit related only to employers who were committing unfair labor practices. The Board contended before this Court that, because Congress had remained silent on the question of the necessity of joining unions, Congress had indicated that it did not wish these unions to be parties to the proceedings. The Court rejected the argument and, in holding that provision for intervention was impliedly contained in the Act, stated:

> "The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that Section 10 (b)

authorizes the Board to serve a complaint only upon persons charged with unfair labor practices, and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it; and also as to the validity of the Act so construed."

In the present case, however, specific provisions permitting review are present, and the clause "any person aggrieved by a final order" is sufficiently explicit to include the appellants. If it is deemed that ambiguity does exist, it is submitted that the usual rule of statutory construction should be applied, and the construction preserving the constitutionality of the legislation should be adopted.

The importance of this phase of our argument requires a digression into the question of whether constitutional requirements compel judicial review of the Board's decision in this case.

The present case involves an exercise by the Board of powers essentially judicial in nature, under which property rights are adversely determined. A regard for due process and separation of powers concepts requires a judicial review. The present case involves a settlement of disputes between individual contestants, which is the very *raison d'etre* and the primary occupation of the courts of law. If it is the essence of the judicial body to decide, certainly a determination of the appropriateness of a unit for collective bargaining purposes, involving a consideration of all of the factors implicit in such a determination, hereinbefore mentioned, is an exercise of the judicial function. When the real controversial nature of the proceeding before the Board is considered, there can remain no doubt as to the judicial nature of the Board's proceeding.

The Board's determination had an adverse effect on the property interests that were litigated in the proceedings.

Whereas in this case one of the contesting unions failed to obtain certification, that union in effect is "put out of business." There is no practical advantage to any working man to affiliate himself with a union that has not the legal right to represent him. The first purpose of any labor organization, its main business, is growth through the acquisition of members. Frequently two rival organizations, specifically the A. F. of L. and C. I. O., engage in a frank, open contest to enlist employees of a given industry or plant in their respective organizations. A decision by the Board certifying one of the two decides that contest. To hold with the Board, to say that such a decision, no matter how arbitrary, no matter how erroneous in law, cannot be appealed from, is to deprive the labor organization which fails to obtain the certification of property without due process of law.

That property rights are involved in the Board's adjudication cannot be denied. This Court, in the case of **Texas & New Orleans Railroad Co. v. Railway Clerks**, 281 U. S. 548 (an injunction suit brought by a labor organization), said that:

> "* * * if it could be said that it was necessary to the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the requirement."

Furthermore, the analogy of the present case to those cases protesting against interfering with advantageous relations, such as **Truax v. Raich**, 239 U. S. 33, and **Pierce v. Society of Sisters**, 268 U. S. 510, likewise indicate the necessary property right. The undenied allegations in the petition respecting the loss of appellants' status as collective bargaining agents, and of the right to engage in

business as a labor organization on the West Coast of the United States, the disruption of membership, the loss of investment of many thousands of dollars in organization expenditures, strike and welfare benefits, and maintenance payments made through the years, more than demonstrate essential property rights.

Since, as seen from the foregoing discussion, the determination by the Board involves primarily a settlement of a controversy between private individuals affecting and involving private property rights, as distinguished from administrative determinations of matters of primary public concern, or matters in which the state has a direct interest where the individual is merely incidentally affected, or matters of governmental privilege or license,[6] it becomes an essential requirement of due process that a court of law ultimately pass upon such determination, at least so far as the settlement of the controversy does not involve expert knowledge of experienced administrators, and involves merely an application of ordinary rules of law. See **Great Northern Ry. Co. v. Merchants Elevator Co.**, 259 U. S. 285; **Ohio Valley Water Company v. Ben Avon Boro**, 253 U. S. 287; **Cowell v. Benson**, 285 U. S. 22; **St. Joseph Stockyards Company v. U. S.**, 298 U. S. 38, 8 L. Ed. 1033.

Another, and perhaps more proper, constitutional deterrent to any attempt to prevent judicial review of final determination of private property interests, by administrative bodies, at least so far as questions of law are concerned, is that such an attempt would constitute an unconstitutional delegation of judicial power. See **Borgnis v. Falk**, 147 Wis. 327, 133 N. W. 209; **Oregon R. & N. Co. v. Campbell**, 173 Fed. 957.

As stated by the Chief Justice in the St. Joseph Stockyards case, supra:

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[6] Prof. Ray A. Brown, "Administrative Commissions and the Judicial Power," 19 Minnesota Law Review 261, at 275, et seq.

"* * * The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Justice Brandeis' concurring opinion in the above case, while emphasizing the desirability of permitting an expert

body to make conclusive determination of technical matters, emphasizes that:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. * * *"

Since the construction contended for by the Board clearly subjects the Act to constitutional objections, it is submitted that the Court, if it believes any ambiguity does exist, should resolve that ambiguity in favor of a construction which should save the Act from constitutional attack.

The foregoing argument is not, of course, an attempt to prove the Act unconstitutional. Nor are we urging that the circuit courts can assume jurisdiction because Congress has failed to provide an appeal. We recognize that no court can acquire jurisdiction by that route. On the contrary, our argument is premised on the fact of an express Congressional grant of jurisdiction under Section 10 (f) of the Act. It is our position that in so far as section 10 (f) may be somewhat ambiguous this Court should adopt that rule of construction which is compatible with the constitutionality of the Act.

F. Applicable Decisions of the Circuit Courts.

The question of whether Section 10 of the Act permits review on orders entered in proceedings under section 9 has been before several of the circuit courts.

The Board made all of the arguments previously discussed before the court below, and its contentions in this respect were rejected in a unanimous opinion. Chief Justice Groner stated in this respect as follows:

"* * * The question in the case is whether the decision appealed from is a 'final order' within the terms of the Act. As a preliminary question, the Board argues that petitioner is without any standing to appeal regardless of whether the order is final or not, but we think the language of Section 10 (f) of the Act sufficiently answers this contention. It authorizes a review at the instance of 'any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought.' The right under this section has already been invoked without question by labor unions in a number of cases, and if the Act should be held to confine the right of review to an employer and to deny it to a representative of the employees, it would create an anomalous situation. We think the fair intendment of the language as well as the purpose of Congress was to provide a judicial review to any aggrieved party where the order is final, without narrowing it in the manner now contended for by the Board. In this view we have a case in which the right, called by the Supreme Court in Texas & New Orleans Railroad Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 571, a property right, is charged to have been wholly destroyed by the action of the Board."

The question was likewise before the Circuit Court of Appeals for the Sixth Circuit in the case of **International Brotherhood of Electrical Workers v. N. L. R. B.**, 105 Fed. (2d) 598 (decided June 28, 1939). That case involved an appeal by a labor organization under section 10 (f) to review a decision of the Board made in proceedings under section 9. The Board objected to the jurisdiction of the Court, making the same arguments here made. The Court, deciding in favor of the labor organization, stated as follows:

"* * * Respondent urges that the Act makes no provision for judicial review in the instant case; that

petitioners' right of review is by Sect. 9 (d) to be held in abeyance until a final order in an unfair labor practice controversy, Sec. 10 (a), which in some degree or manner involves petitioners' complaint, comes up for review. But there is no controversy here over labor practices as between the Company and its employees. Indeed, it is not shown that any such controversy exists. It may never arise, or, if it should, it may never be presented here.

"In this situation does this court have jurisdiction to review the order complained of, which, as we have pointed out, destroys the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. We cannot think that the Congress overlooked this important matter. The right of employees to choose their own representatives for collective bargaining was generally recognized and conceded long before it was guaranteed by the National Labor Relations Act, 29 U. S. C. A., Sec. 151 et seq. See the discussion in National Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, at page 33, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. This essential property right was not only guaranteed, but was safeguarded, otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment, U. S. C. A. Const.

"Section 10 (f) provides:

" 'Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business * * * by filing in such court a written petition praying that the order of the Board be modified or set aside.'

"Petitioners are 'persons' as defined in Section 2 (1)

of the Act, 29 U. S. C. A., Sec. 152 (1). They reside and transact business in this circuit. For the reasons above indicated they are justly aggrieved by the order of the Board complained of, which denied to them their rights under Sections 7 and 9 of the Act, 29 U. S. C. A., Secs. 157, 159.

"Respondents insist that the order is not final, but it was final not only in its effect but in that it was the last order to be made under the procedure set out in the Act for the determination of representatives of employees for the purposes of collective bargaining with the Company. It is true that if the election had been held it was the duty of the Board to certify the result, but a certificate is not an order.

"Finally, it is said that the phrase 'wherein the unfair labor practice in question was alleged to have been engaged in,' found in Sec. 10 (f), limits the right of judicial review of procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy, but does not confine it thereto.

"The Supreme Court did not so limit it in Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 226, 59 S. Ct. 206, 83 L. Ed. .... See also the discussion touching jurisdiction under Sec. 10 (f) found in In re National Labor Board, 304 U. S. 486, 493, 58 S. Ct. 1001, 82 L. Ed. 1482, and in Ford Motor Company v. National Labor Board, 305 U. S. 364, 369, 59 S. Ct. 301, 83 L. Ed. ...."

The Board relies on the case of **Wallach's, Inc., v. Boland et al.**, 2 N. Y. S. (2d) 179, which involved an appeal by an **employer** from certification under Section 705 of the New York Labor Laws. The sole issue (by stipulation) was whether the Board's decision was reviewable. Section 707 (4) of the act provides for review of unfair labor practice cases to parties aggrieved. The **employer** having appealed, it was held he, the **employer**, was not an aggrieved

party. As to him the certification was not a final order. Two of the five judges dissented. Significant, however, is the following statement of the Court:

> "A different question might be presented if the determination involved only a **dispute between employees** concerning the right to represent their fellows, **wherein no further proceedings under Section 706** (unfair practices) would be taken."

The New York Act is similar to the Federal Act.

The Board relies principally on the case of **United Employees Association v. National Labor Relations Board**, 96 Fed. (2d) 875, decided by the Third Circuit March 18, 1938. That case on its facts is analogous to the present one. It is submitted, however, that the reasoning of the Court therein is erroneous. The opinion states that the final certification of a rival union is a fact "which can be entirely ignored and disregarded" by a labor organization. The Court does not explain in what effective manner the aggrieved labor organization "can entirely ignore" the designation of a rival and still continue in existence.

The Court further states that:

> "* * * If and when the Board by a final order directs the petitioner in this case to cease and desist from any of its practices or to do anything the petitioner may obtain a review of that order by this court, which may then examine the regularity of the proceedings by which the Board found that the union was the exclusive representative of the Association for the purposes of collective bargaining, but until then both the Association and the Company may proceed just as though no election had been held or certification made. Until then neither the Association nor the Company are hurt."

Why the Association, which was a labor organization,

is not hurt is not explained by the Court. Further, in the above quoted passage, the Court speaks of a final order that might be entered directing the petitioner therein (which was the employee representative or association) to cease and desist from doing anything, and that then the petitioner may obtain a review. The Court is clearly in error in so stating, for there is no power in the Board to issue cease and desist orders against unions or employee representatives, except perhaps in so far as they are company unions, and even then the order is directed against the company. It would seem that the decision of the Third Circuit has too insubstantial a basis in logic or reasoning to serve as persuasive authority in the instant case.

III.

THE PRESENT ORDER CONTAINS ALL THE ELEMENTS OF "FINALITY" ENTITLING APPELLANTS TO JUDICIAL REVIEW.

A. The Meaning of Final Order.

We come now to the question of whether the Board's decision of an appropriate unit and the order of certification based thereon constitutes a "final order" within the meaning of the term as used in section 10 (f). Congress, as is usual in providing for court review of administrative action, specified that only those orders which were "final" —that is, definitive, and entered at the conclusion of an adversary proceeding—were appealable. The purpose of such provision is, of course, threefold—to protect the Board against harassment, persons seeking relief under the act against delay, and the courts against an inundation of litigation instituted during interim stages of a proceeding. Further, and quite properly, the courts have protected the comparatively new process of administrative

government by the promulgation of a series of "tests." On examination these "tests" are almost all found to have an ultimate basis in two fundamental doctrines of policy. These doctrines were stated by this Court in its recent decision in the Rochester case to be: (1) "the primary jurisdiction doctrine," which requires that matters calling for technical knowledge should be first adjudicated by the expert administrative body, and (2) "the doctrine of administrative finality," which requires that the range of issues upon review must be narrowed to questions affecting constitutional power, statutory authority and basic prerequisites of proof. Back of all the tests and doctrines is the fundamental of a judicial regard for the special functions of administrative agencies and a desire to permit their practical operation in the manner intended by Congress.

Prior to the Rochester decision the courts, in their earnest attempt to preserve a practical workability in administrative procedure, laid down certain more or less formulistic criteria.

Frequently these criteria were short-cut techniques of expressing the basic considerations underlying the Court's decision. In too many instances, however, the courts relied exclusively on these devices and overlooked the fundamental policies and rationale for granting or denying review in any given case.

The Court often seized upon particular circumstances peculiar to the case before it and generalized such circumstances into a rule or test. Examples of such tests or rules are the necessity that an order be "affirmative"; that it effect a change in a status quo; that it be couched in the language of a command; that it be enforceable by the tribunal making the order and no other; that it require a particular thing to be done.

In quite recent years a ritualistic conformance with

these formulae has given rise to the denial of review under circumstances where the Court felt compelled to permit review by way of a "bill in equity." See **Shields v. Utah Idaho Central Railroad Co.**, 305 U. S. 117, and **Utah Fuel Company v. National Bituminous Coal Company**, decided January 30, 1939. It is possible that the consequence of permitting review in such manner, and at the same time clinging to the legalistic "tests," may be found more disastrous than a laxness in permitting review under the terms of the administrative statute in question; for the extent of review is almost as great, and the petitioner must resort to a court other than that intended by Congress to be the reviewing court. Not only is an additional appellate step necessary, but also matters which the circuit courts can more properly determine because of their greater experience, will be entrusted to the district courts.[7]

The necessity imposed on the court below to follow religiously the formulae prescribed by this Court in cases prior to the Rochester decision is responsible for the decision in the present case. The lower court not only decided the case against its own better judgment, but even contrary to a formula that it had previously worked out for its guidance. The dangers, as well as the absurdities, involved in a rigid doctrinal application of any set pattern of rules is concretely illustrated by the decision.

The following portions of the opinion are quoted both in the above connection and, more important, as full support of our contention that the present order is in effect and substance a final definitive order. We could frame no better statement of our position than that made by Chief Justice Groner in the following portion of his decision:

> "• • • Enough has been said to show that we have here a controversy between two national labor

7 See 48 Harv. L. Rev. 1257.

organizations, both of which have appealed to the Board to resolve their conflicting rights and the rights of their members, and one of which claims that the unlawful action of the Board in the designation of an employer unit beyond the terms of the Act has destroyed its property rights and the property rights of its members and that, unless it can obtain a review by appeal to this Court or some other Circuit Court of Appeals, it will be wholly without redress of any kind.

* * * * * * *

"The Supreme Court has held in a number of cases that mere preliminary or procedural orders of an administrative body are not reviewable by the Circuit Court of Appeals, and this brings us to our starting point, namely, whether what happened here was in effect a final order commanding or directing something to be done. In the case of **Mallory Coal Company v. National Bituminous Coal Commission**, 99 F. (2d) 339, we endeavored to review this question in the light of the decisions of the Supreme Court and to lay down a test as a guide to ourselves in determining the question. We said:

> "'Underlying all these tests of appellate jurisdiction is the fundamental requirement that the person seeking review must first have exhausted his administrative remedy. If the order in the particular case is definitive rather than preliminary or procedural; if the order operates particularly upon the person seeking review, rather than upon the world generally or upon a large group of interested persons; if the order was entered in a proceeding, adversary in character, after notice given, with a hearing at which witnesses were examined and points of law argued, and in which findings of fact were made; if a petition for rehearing was filed urging, upon the Commission, the objection to the order now urged

for the consideration of the courts; each of these circumstances—and more particularly all of them together—may indicate that the administrative remedy has been exhausted and that it is time for judicial review. Until that time comes, the matter should remain in the control of the administrative agency.'

"Examined in the light of this formula, the decision of the Board in the case in hand contains all the elements we believed to be necessary to make it reviewable under the statute. The proceeding out of which it emerged was neither preliminary nor incident to another proceeding. It concerned a controversy affecting the vital interests of two rival unions. It was begun and concluded for the purpose of settling the dispute. It was authorized by the statute to be made and so far as concerned the unions it was final. Its actual effect was to eject petitioner from the controversy. The suggestion that petitioner might have induced the employer to reject the finding and subject himself to an unfair labor proceeding and thus secure a court review, is wholly beyond the point. Petitioner had no control of the employer, and here the petition shows that the employer, acting within the spirit as well as the letter of the Act, promptly obeyed the Board's decision and entered into a contract in accordance with its terms. So that what happened was precisely what in a proper case the Act designed should happen—but, as we have seen, with the result that petitioner, in the localities in which its members constituted a majority, was—if the Board's decision as to the representative unit is valid—deprived of the very thing which petitioner insists it was the purpose of Congress to secure and protect. We had thought that whether an order or decree is final is not to be determined by the name which the court or board gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in other words—what is done by it. The decision in

question undoubtedly operated particularly upon petitioner. It was an adversary party. The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies. • • •"

"The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies. But, notwithstanding all of this, we think we are bound to hold that the 'decision' was not an 'order' as that term is defined in **Shannahan v. United States**, 303 U. S. 596, and in **Shields v. Utah Idaho Central Railroad Co.**, .. U. S. .. (decided December 5, 1938).

"In the Shannahan case the controversy involved the right of an electric railroad to be exempt from the scope of the Railway Labor Act under a proviso excluding street, interurban, or suburban railways. The Act authorized and directed the Interstate Commerce Commission upon request of the Mediation Board to 'determine' whether the line fell within the terms of the proviso. The Commission determined it did not. An appeal was taken under the provisions of the Urgent Deficiencies Act to set aside the decision. The Commission challenged jurisdiction of the court on the ground that the 'determination' of the Commission was not an order, and on hearing it was so decided and the bill dismissed. On appeal to the Supreme Court the decision was affirmed, and it was said the 'determination' was not an order at all and was no more than a 'decision on a controverted matter.' And in **Shields v. Utah Idaho Central Railroad Co.**, which shortly followed, the Court said a 'determination' or 'decision' by an administrative body may be definitive, may be legal, and may be binding as to all parties concerned, but it is still not an 'order' if it does not also command or direct a particular thing to be done and, because it is not an order, it is not appealable and is subj (fol. 79) ject to challenge and judicial review only by bill in equity.

"Accepting, as we must, this restrictive definition

and applying it to the case at hand, we hold that, though the decision here was required by the Act to be made and to be made on the evidence and argument after judicial hearing and though it was definitive, adversary, binding, final, and in this case struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographical area of the Nation, it was not an order because the Act did not require it to be made in the language of command, and hence is reviewable—as was held in Shields case, supra, and in **Utah Fuel Co. v. National Bituminous Coal Commission**, . . U. S. . . (decided Jan. 30, 1939)—only in an independent suit in equity commenced in a District Court.

"Petition dismissed."

As the court below has recognized, appellants, by reason of the Board's decision and order certifying a competing and rival union as the exclusive bargaining agency for all longshore employees in a large geographical section of the United States are effectively eliminated from engaging in their business of representing longshore employees in that district. The order has as effectively deprived appellants of their status as a collective bargaining representative as if they, themselves, had been ordered to quit doing business on the West Coast. The employers, through an association, have entered into a contract with the C. I. O. unions, giving the C. I. O. members a preferential employment status, and, for all that petitioners have power to prevent, an out-and-out closed shop contract may likewise be entered into, thereby not only depriving appellants of their right to engage in business as labor organizations, but, what is worse, also depriving their members of their very livelihood by securing their dismissal and replacement with members of the rival organization.

B. **Shannahan and Shields Cases Are Not Determinative.**

Before proceeding with a discussion of the Rochester decision and its application to the present case it should be pointed out that the court below erroneously construed the Shannahan and Shields cases to require a dismissal of our petition.

It is true that the language used in the Shannahan and Shields cases indicates that a test of a final order is that it be made in the language of a command and that it direct a particular thing to be done. It is submitted, however, that the court below followed the language rather than the theory of these cases. Neither of these decisions was based on the fact that the order or orders there involved did not command a particular thing to be done. Rather, the sole rationale of these decisions was that the effectiveness of the order involved depended on some further future administrative action. As far as we have been able to ascertain this Court has never decreed the nonreviewability of an order on the sole and specific basis that the order was not framed in the language of a command and did not direct a particular thing to be done. Obviously, such a superficial distinction could quite easily afford opportunity for disregard of fundamental rights by the simple device of effecting a change in the form of an order without altering in any way its substance.

In the Shannahan case the Interstate Commerce Commission had determined upon application of the National Mediation Board that the Chicago, South Shore and South Bend Railroad was not within a **proviso** exempting certain street railways from the Railway Labor Act, and that the railroad was subject to the Railway Labor Act. Before any adverse result could obtain from this finding an additional proceeding would have to be instituted by the Mediation Board at some time in the future. Until that was done no status or right was in any way affected.

In the Shields case, which was based solely on the Shannahan case, the Interstate Commerce Commission had found that the Utah Idaho Central Railroad Company, like the Chicago, South Shore and South Bend Railroad involved in the Shannahan case, was not within the exemption of certain street railways from the Railway Labor Act, and that the railroad was subject to the Railway Act. The Court found that the Commission's determination was binding and final, but was not an order which could be appealed for the reasons stated in the Shannahan case. In the Shields case, however, the Mediation Board, pursuant to the Interstate Commerce Commission's findings, had ordered the carrier to post a notice that labor disputes would be handled under the Railway Labor Act. Disobedience of this order was punishable in a criminal suit by the United States Attorney. The Court accordingly permitted the petitioner relief under the equity jurisdiction of a District Court. Both of these cases, however, go no further than to state that where "the order sought to be reviewed does not of itself adversely affect complainant, but only affects his rights adversely on the contingency of future administrative action" (Rochester case), then it is not a final reviewable order. That the above was the rationale of these decisions, and that they did not have their basis in the language used therein which the court below felt compelled to follow is clearly indicated by this Court in the Rochester case (see 83 L. Ed. Adv. sheets, at page 722). The fundamental reason for denying review in these cases, as well as in the case of **United States v. Los Angeles Ry. Co.**, 273 U. S. 299, relied on by the Board and used as authority in the Shannahan case, is that resort to the courts where a complainant's rights could be affected adversely only on the contingency of future administrative action, was either premature or beyond their province.

The Los Angeles case involved a situation where an order as to the value of property depended upon future action by the Interstate Commerce Commission to have any adverse affect. Those very matters determining reviewability which were stated by Justice Brandeis to be absent in the Los Angeles case are involved in the present case. If the language in the following portion of Justice Brandeis' decision were stated affirmatively it would fully describe the present case:

> "* * * The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; **which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility;** which does not subject the carrier to any liability, civil or criminal; **which does not change the carrier's existing or future status or condition; which does not determine any right or obligation** * * *."

One of the former tests which the Rochester decision recognized as having consistent application in all earlier cases is that an order is reviewable if it has the legal effect of changing a status quo or permitting what was previously not allowed or compelling what was previously not required.[8] Under this test the appellants are certainly entitled to a review. Its status quo has been radically altered and the Board has compelled bargaining on a coast-wide basis through a rival organization, a status previously not required.

The Board argues that the order in the present case, as in the Shannahan and Los Angeles cases, depends for its effectiveness on future action by the Labor Board—the issuance of an order in an unfair labor practice proceeding. Such an argument entirely ignores the realities.

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[8] See footnote 24, Rochester Telephone Co. v. U. S., 83 L. Ed., at page 728.

The present order, so far as the appellant unions are concerned (although concededly the case is different if an employer were complaining), becomes effective immediately the decree is issued. While it may be that the employer can forestall the effect of an order on him, the union cannot, not only by a deference to the provisions of the National Labor Relations Act, but by the practical exigencies of the situation. Immediately that the employer has recognized the opposing union as the exclusive representative of all employees in a comprehensive unit designated by the Board, which the employer has done in the present case, the complaining union has absolutely no alternative but to abide by the decree unless he is permitted to appeal to a court of law. It is fatuous to say that the appellants can refuse to recognize the decision when there is no one with whom they can deal. Nothing remains for the appellants but to suffer themselves to go out of existence. The Board well realizes this fact, and well realizes the conclusive effect of its decree in the present case. It is sophistry of the most vicious sort to argue that the appellants here "can simply ignore" the order of the Board. Further, it is most reprehensible for the Board to argue, as it did before the court below, that its final determination in the present case entered after prolonged hearings, and accompanied by lengthy findings of fact and conclusions of law, has no effect whatsoever, can be obeyed or disobeyed at the will of the party against whom it is directed, has no force or effect in law, and is a mere determination of fact amounting to no more than an act of grace. The Board seemingly would deprecate the express command set forth in Section 8 (5) of the act that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of a majority of his employees and the substantive provision contained in section 9 (a) prescribing that:

"* * * Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

"Negative Orders" as Classified by Rochester Case.

In the Rochester case this Court classified orders formerly termed "negative" and held nonreviewable into three groups:

"(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission * * *.

"(2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part * * *.

"(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person."

After re-examining the cases in the last two classifications the Court found the orders therein involved were properly reviewable. It is submitted that the situation here present is within the third classification and not within the first classification, where the Shannahan and Los Angeles cases are placed. In the present case the order complained of refused to compel certain conduct by third parties; the employer, i. e., refused to prescribe the unit contended for by petitioners, the single employer unit, as being the largest unit authorized under the statute, thereby refusing

to compel the individual employers to bargain with a representative of appellants chosen by employees in single-employer units, in which units appellants concededly held a majority in a great number of cases. It can even be said that the present situation is also properly classified in group two, as being an order having the effect of placing the complainant outside of a statute or of a statutory command. In the present case the Board's order has the effect of placing the employer outside of the operation of the statute in so far as appellants' demand for recognition in their particlar units is concerned, thereby likewise placing appellants outside of the benefits of the act. At any rate, it is quite clear that the present situation is not within group one, and for that further reason the Shannahan and Shields cases are not controlling.

C. Rationale of Rochester Case Controlling.

The Rochester case contains for the first time a statement of ~~fonctional~~ criteria which are or should be determinative in considering the reviewability of administrative orders. In contrast to the multitude of "tests" set forth in previous decisions, these criteria derive essentially from a regard for the special nature and functions of administrative agencies. Without presuming to establish any new series of tests which can act as a universal formula, it can be generally stated that the Rochester case prescribes five fundamental prerequisites to court review:

(1) There must exist a "case" or "controversy" under Article III, Section 2, of the United States Constitution, and a review must not be sought of an interim step in a proceeding. As a corollary, administrative remedies must be exhausted.

(2) The conventional requisites of equity jurisdiction must exist.

(3) The statute must permit an appeal.

(4) Matters calling for technical knowledge pertaining to the subject with which the administrative tribunal are established to deal must first be passed upon by that tribunal.

(5) The range of issues open to review must be limited to questions affecting constitutional power, statutory authority, and the basic prerequisites of proof.

These requirements satisfied, a court can permit relief to a complainant without fear of obstructing administrative procedure.

The present case satisfies all of the requirements set forth above. Discussing their application to the present case in the aforementioned order we find that—

(1) A case or controversy exists over property rights which has been finally adjudicated by the Board. The order now being appealed is certainly not preliminary or procedural. The only purpose of the proceedings, lasting several weeks, was to determine the majority representative, and to determine the appropriate unit. All the testimony was devoted to that one end. No other relief was sought, or was intended. It dealt entirely with the merit of the controversy between the C. I. O. and the A. F. of L. as to the appropriate unit and as to the majority representative in the various units claimed by the two contending parties. Following the taking of such testimony the Board issued its findings of fact and conclusions of law in the form of a decision, in which it certified the C. I. O. as the exclusive representative of the entire west coast. This decision fixes conclusively appellants' status, privileges, licenses and rights. Further the present case involves a proceeding which was as adversary in character as any dispute in a court of law. Notice and a petition were issued, answers were filed by opposing parties, wit-

nesses examined, points of law argued, and findings of fact and conclusions of law were made by the Board at the conclusion of the hearings. Whatever administrative remedies might be available were finally exhausted by the filing of a petition for rehearing urging upon the Board the objections to the order now urged for consideration of the Court. These objections were overruled by the full Board and the petition for rehearing was dismissed.

(2) The fundamental requisites of equity jurisdiction are met by the fact that substantial property rights are being destroyed and the damage is irreparable.

(3) That the National Labor Relations Act authorizes the review being sought is argued at length in argument II, infra.

(4) In the present case all technical matters and all matters peculiarly within the knowledge of the National Labor Relations Board have been passed upon by that Board. The Appellate Court is not being asked to pass upon or review any matter requiring specialized knowledge or experience in the field of labor relations. Appellants seek solely a construction of the Wagner Act.

In the present case the appellants request a review by the Court of a pure question of law, of statutory construction—a determination which requires "an expertness" attendant more on the judiciary than on any administrative body. We emphasize this point in recognition of the proposals made by leading authorities on administrative law.[9] These proposals are based upon the tenuous distinction between questions of fact and conclusions of law.[10] They urge that where expertness is desirable to determine issues which formerly have been called issues of law (such as valuable in rate-making controversies), then the deci-

9 Landis, "The Administrative Process," page 114 et seq.

10 Dickinson, "Administrative Justice and the Supremacy of Laws in the U. S.," page 55.

sions of the administrative tribunal should be granted the same finality as is generally given to so-called factual determinations. Certainly it cannot be claimed by the Board that its determination of the question of its authority under the Act was one peculiarly in the performance of its administrative functions.

(5) The doctrine of administrative finality is respected. In the present case the request for review is limited to the question of the Board's authority under the Act to take the action it did and prescribe a unit larger than that of a single employer. This is solely a question of statutory construction.

It is respectfully submitted that the controlling principles of law and policy so lucidly expressed in the Rochester decision, when applied to the present case, compel the conclusion that the Circuit Court of Appeals had jurisdiction to review the Board's order in this case.

As previously mentioned, the possibility of a resort to a district court for a determination of the present issues, which are ordinarily exclusively determined by circuit courts and which are usually beyond the experience of district courts, is neither an effective, nor an expeditious, nor a final method of disposing of the issues or of protecting appellants' rights, and it is not the method of review contemplated by Congress. Congress expressly designated review only in courts of appellate jurisdiction, in the first instance. It should be noted that wherever and whenever appellants have attempted to seek a determination of the validity of an order entered in a representation proceeding they have invariably encountered the vehement opposition of the Board, which, relying on such cases as **Howard Myers et al. v. Bethlehem Shipbuilding Corp., Ltd.**, and **Howard Myers et al. v. Charles McKenzie et al.**, 303 U. S. 41, and **Newport News Shipbuilding and Dry Dock Co. v. Bennet F. Schauffler et al.**, 303 U. S. 54, and **Heller Bros.**

Co. v. Lind et al., 86 F. (2d) 862, and numerous other decisions of various district courts throughout the country, has successfully argued that under the National Labor Relations Act the district courts of the United States have no jurisdiction over any matter pertaining to the Labor Relations Board or its activities (Brief of National Labor Relations Board in American Federation of Labor et al., Plaintiffs, v. J. Warren Madden, individually, J. Warren Madden, Chairman et al., Civil Action No. 552, in the District Court of the United States for the District of Columbia, the appeal from mandatory injunction dismissed for lack of jurisdiction May .., 1939). Seemingly, if any review of the Board's actions is to be had, it must be in a circuit court of appeals.

CONCLUSION.

The decision of the Board in this case is not right and is not in conformity with the law. Former Chairman Biddle, of the former National Labor Relations Board, testifying before the Committee of Congress in March, 1935, when the precise question was up for consideration, in discussing the present provisions of section 9 of the Act, said:

> "Moreover, any arbitrary act of the Board in selecting the unit is subject to check or review by the court."

We pray the Court to sustain the contentions set forth in this brief so that a review of the Circuit Court of Appeals may be accorded the aggrieved union from arbitrary and unlawful action of the Board in selecting the unit, which in this instance will destroy numerous American Federation of Labor unions lawfully selected as their representative by the majority of the employees of an

employer, and in many instances by all of the employees of an employer.

Appellants respectfully submit, for the reasons hereinbefore set forth, that the judgment of the Court of Appeals for the District of Columbia be reversed.

Respectfully submitted,

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Dated November 4, 1939,
321 Tower Building,
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